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SUPREME COURT OF THE UNITED STATES

TERM, 195

NO. 825

PERRY J. FISHMAN, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MOTION TO DISPENSE WITH PRINTING OF PETITION

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner moves this court for Order permitting him to dispense with the printing of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, for the following reasons:

1) He is ill and unemployed.

2) He is dependent on others for support and maintenance.

However, the petitioner is able to pay the fees required for filing the petition with the Clerk of the United States Supreme Court.

George D. Kline

GEORGE D. KLINE
Counsel for Petitioner

POOR COPY

AFFIDAVIT

PERRY J. FISHMAN, being duly sworn, according to law, deposes and says that he is the Petitioner herein named, and all the facts contained herein are true and correct.

Perry J. Fishman

Sworn to and subscribed
before me this 7th day
of March 1957.

Albert G. Bruce.
Notary Public

My Commission Expires:

POOR COPY

SUPREME COURT OF THE UNITED STATES

TERM, 195

NO.

PERRY J. FISHMAN, PETITIONER

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

TERM, 195

NO.

PERRY J. FISHMAN, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 23, 1957, rehearing denied, February 11, 1957.

(a) OPINIONS BELOW

No opinion of the District Court for the District of New Jersey was rendered. The opinion of the Court of Appeals have not yet been reported. Copy thereof is hereto annexed as Appendix A (pp. 11-13, infra).

(b) JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on January 23, 1957 and is final.

Petition for Rehearing was denied February 11, 1957.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

(c) QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence presented by the United States was sufficient to support the conviction of conspiracy (18 U.S.C. §371) to defraud the United States of funds by means of the operation and possession of a still in violation of 26 U.S.C. §§ 2810 (a), 2833 (a), and 3321.

(d) STATUTES INVOLVED
18 U.S.C. §371

"§371. Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

*****

(e) STATEMENT OF THE CASE

Petitioner was indicted on four counts, the first charging that the Petitioner with the other defendants "did willfully and knowingly conspire with one another to commit certain offenses against the United States of

America" namely to carry on the business of a distiller "with the intent to defraud the United States of America of the tax on spirits distilled by them" (26 U.S.C. §2833 (a)); "to possess and have under their control a still "for the purpose of making and distilling alcoholic liquor..." in violation of 26 U.S.C. §2810 (a); "to remove, deposit and conceal goods or commodities"... with the intent to defraud the United States of tax" (26 U.S.C. §3321); "and to have and possess distilled spirits and property, to wit sugar yeast, tin cans and caps and distilling equipment used or intended for use in violation of the internal revenue laws relating to liquor (26 U.S.C. §3116), "located in a building on a farm on Route 68 and Monmouth Road, Jobston, Burlington County, New Jersey, within the jurisdiction of the Federal District Court for the District of New Jersey.

The second, third and fourth counts charged the petitioner and others with actually carrying on the business of a distiller, having in his possession a still set up for making and distilling liquor, and having in his possession property used or intended for use in violation of the internal revenue laws relating to liquor.

On May 2, 1956, Judge Forman ordered motion for judgment of acquittal on count 1 denied and on counts 2, 3, and 4 granted. The jury found the petitioner guilty of the conspiracy count on the following evidence alone:

1) That the Petitioner, in the name of another, purchased an oil burner. (R 053-054).

2) An oil burner of the same brand purchased by the Petitioner was found at the still. The seller of the oil burner was unable to positively identify the photograph of the oil burner found at the still as the oil burner he had sold to the Petitioner. (R040-041; 043). There was some question whether one of the government's witnesses had identified the oil burner by serial number; yet no evidence was introduced by the government that the invoice carried the same serial number. (Charge to jury: R 117).

3) On the night of the raid on the still the petitioner was a passenger in an automobile which approached the house in which a farmer and his family lived and on which farm the still was located. Neither the driver of the automobile nor the other passenger was indicted; the farmer was indicted along with the petitioner but was found not guilty. (R. 018-020(

4) That the petitioner was once in the company of a man named Minkoff at a time when Minkoff purchased a filter press. (R. 028-030) A filter press of the same brand was found at the still. (R. 030-031)

5) That cans and tops similar to ones found at the still were purchased by Minkoff. (R. 055-075)

Petitioner was sentenced to two and one-half years in prison. Immediately thereafter, a motion for a new trial and a motion for judgment of acquittal were filed. On May 11, 1956 both motions were denied and Judgment and Commitment were filed. On May 18, 1956 notice of appeal to the United States Circuit Court of Appeals was filed.

The Circuit Court of Appeals affirmed the conviction Opinion filed January 23, 1957 appendix pp. on the authority of Holland v. United States, 348 U.S. 121 (1954), rehearing denied, 348 U.S. 932 (1955). Petition for rehearing was made on the basis that an error was made in not transcribing the entire record, and that the court of appeals had misconceived an important element of the testimony. Rehearing was denied February 11, 1957.

(f) REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The Court below has decided an important question of federal criminal law relating to the test for the sufficiency of evidence necessary to sustain a conviction under § 18 U.S.C. § 371. The decision below is in direct conflict with the decisions of this Court in United States v. Falcone, 311 U.S. 205 (1940), and as explained in the decision of this Court in Direct Sales Co. v. United States, 319 U.S. 703 (1943) and has misinterpreted the import of this Court's decision in Holland v. United States, 348 U.S. 121 (1954), rehearing denied, 348 U.S. 932 (1955).

1. The evidence in United States v. Falcone, supra, connecting Nicholas Nole with the conspiracy, as set forth in the brief for the United States, is as follows:

> Nicholas Nole was the proprietor of Acme Yeast Company, whose proprietorship he falsely registered in the name of a cousin who had no part in the business. (73).

> Acme Yeast wrappers, which had been provided by Nicholas Nole himself (R 73) were found at one of the stills. (R42). Nicholas Nole was also the proprietor of "Utica Freight Forwarding Company," the addressee of a consignment of one and one-half tons of "K & M" imported keg yeast (R73), a brand found at some of the stills (R 46, 49); the order for this consignment of yeast had been placed in the name of an unidentified person (R73). There was evidence of the association of Nicholas Nole with several of the convicted conspirators, including Melito (R55, 64-65, 68) during the summer and fall of 1957, the period of operation of at least one of the stills (R 217). On one occasion during the period of these associations, Nicholas Nole sold and delivered illicit alcohol from a source not stated (R 56). Brief for United States, p. 7, United States v. Falcone, 311 U.S. 205.

There was no evidence to be found in Briefs or Records before this Court in the Falcone case as to whether Nicholas Nole sold the yeast, or otherwise transferred it to the distillery where the yeast wrappers were found. The above excerpt from the government's brief was evidence only that Nicholas Nole supplied yeast to the distillers. Nor was there any evidence that the Acme Yeast Company was not set up solely for the purpose of supplying yeast to the distillers.

Thus there is no basis for distinguishing the situation of the Petitioner here from Nicholas Nole, either on the basis that there was no evidence to show that the Petitioner sold the oil burner to the distillers or that he was not a vendor of the goods. Cf United States v. Gerke, 125 F.2d 243 (3d Cir. 1942) where defendants were acquitted even though they

made only one purchase for transfer to an illegal business.

2. The rule of law as to proof required in conspiracy cases is set forth by this Court in Direct Sales Co. v. United States, 319 U.S. 703 (1943) directly applying to the Falcone decision. The rule is this: that the evidence must show that he knows of the intended illegal use and that he intends to further, promote and cooperate in it. "Without the knowledge, the intent cannot exist. Furthermore, to establish intent, the evidence of knowledge must be clear, not equivocal". (Citations omitted). Direct Sales Co. v. United States, 319 U.S. at 711.

The reason for this rule was made clear by the Second Circuit's decision in the Falcone case: "The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. (United States v. Falcone, 109 F.2d 579, 581 (1940). A similar opinion was set forth in Direct Sales Co., 319 U.S. at 711.

a) In cases such as the one at bar, where the evidence is entirely circumstantial, the Fifth Circuit Court of Appeals has stated the above rule thusly: in order to sustain the conviction the inferences reasonably to be drawn from the evidence must not only be consistent with the guilt of the accused but inconsistent with every reasonable hypothesis of his innocence. Vick v. United States, 216 F.2d 228 (5th Cir. 1954) and cases

cited therein.

b) Before this Court's decision in Holland v. United States, 348 U.S. 121 (1954), the Third Circuit Court of Appeals also used the same test. See Girgenti v. United States, 81 F.2d 741, 742 (3d Cir. 1936); United States v. Gerke, 125 F.2d 243 (3d Cir. 1942). In the Gerke case, beside evidence that one of the defendants had purchased an oil tanker with funds supplied by the convicted conspirators, there was evidence that the defendant was on the tanker after it had been transferred to the conspirators and after it had been used for its illegal purpose. The court held that the evidence was insufficient to sustain the conspiracy charge, and even the defendant's presence on the boat was as consistent with his innocence, namely to safeguard a lien on the tanker for the unpaid balance of the purchase money, as with the inference that he knew of the conspiracy. The Gerke case was even stronger for conviction than the present case since in Gerke the evidence was unequivocal that the defendant purchased and outfitted the very tanker involved and that the defendant was on the tanker after its illegal use.

c) The court below obviously interpreted what was said in Holland v. United States, supra, in reference to the jury charge (348 U.S. at 138, 140) to mean that the test they had used in Girgenti v. United States, supra, and United States v. Gerke, supra, was incorrect, and therefore affirmed the conviction.

The Holland v. United States case decided only that the judge's charge

to the jury need not contain a statement to the effect that where the evidence is circumstantial it must be such as to exclude every (reasonable) hypothesis other than that of guilt. However, the Court of Appeals in many cases have used this phrase only as a rule of thumb to test the evidence to see if it were in fact sufficient to enable the jury to find the defendant guilty beyond a reasonable doubt. See, e.g., Vick v. United States, 216 F.2d 228 (5th Cir. 1954); Girgenti v. United States, 81 F.2d 741 (3d Cir. 1936); United States v. Gerke, 125 F.2d 243 (3d Cir. 1942); United States v. Falcone, 109 F.2d 579 (1940).

There is nothing said in Holland v. United States which would indicate that evidence that was once thought to be insufficient to sustain a conviction, is now sufficient to sustain a conviction, or that this Court intended to change the rule laid down in the Falcone and Direct Sales Co. cases, and followed in United States v. Gerke.

3. The question presented by this case is of great and recurring significance in the administration of federal criminal law. This serious question as to the proper rule of law concerning the sufficiency of the evidence should be decided by your Honorable Court in its supervisory capacity over the administration of justice in the lower federal courts by setting forth a rule which is consistent with the interpretation of the decisions of this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE D. KLINE
929 Land Title Building
Philadelphia 10, Pa.

APPENDIX

(Opinion of the United States Court of Appeals
For the Third Circuit)

UNITED STATES COURT OF APPEALS

For the Third Circuit

NO. 11,969

UNITED STATES OF AMERICA

Appellee,

v.

SOLOMON ALLARD, alias JOSEPH DAVID: PERRY J. FISHMAN, alias FISHER: ARMANDO P. GERVASONI: CHARLES LEONARD: and HARRY MINKOFF

PERRY J. FISHMAN,

Appellant

Appeal from the United States District Court for the District of New Jersey

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Argued January 11, 1957

Before Goodrich, Kalodner and Hastie, Circuit Judges.

OPINION OF THE COURT

(Filed January 23, 1957)

Per Curiam

The defendant was convicted of conspiracy to distill liquor illegally in violation of the United States liquor laws. The indictment charged a conspiracy to defraud the United States, 18, U.S.C. §371, and violation of the following sections of the Internal Revenue Code of §939: 26 U.S.C.A. §2810 (a), 2833 (a), 3321. In this appeal it is argued that the evidence was insufficient to sustain a conviction.

A favorite method of attack on convictions in this and similar cases is to use the analogy of the links of a chain. If the chain has a weak link, the argument runs, the whole chain breaks and the defendant is entitled to a judgment of acquittal. We think this is not an accurate way to pose the legal problem. The question is whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let a jury find him guilty beyond a reasonable doubt.

In this case the evidence against the defendant was all circumstantial. He was apprehended at the end of a lane near a dwelling house upon a farm. At the time he wasaccompanied by another person who was driving the automobile. At this farm illicit distillation was in progress.

Prior to that the defendant had bought an oil burner in Trenton under a fictitious name, paying cash for it. This oil burner was a larger one than usually sold for household use. It was identified by brand name by the seller. In answer to a question whether he could tell whether it

was the same oil burner as found on the premises of the still, he said, "It would seem so." That was as definite as his identification was.

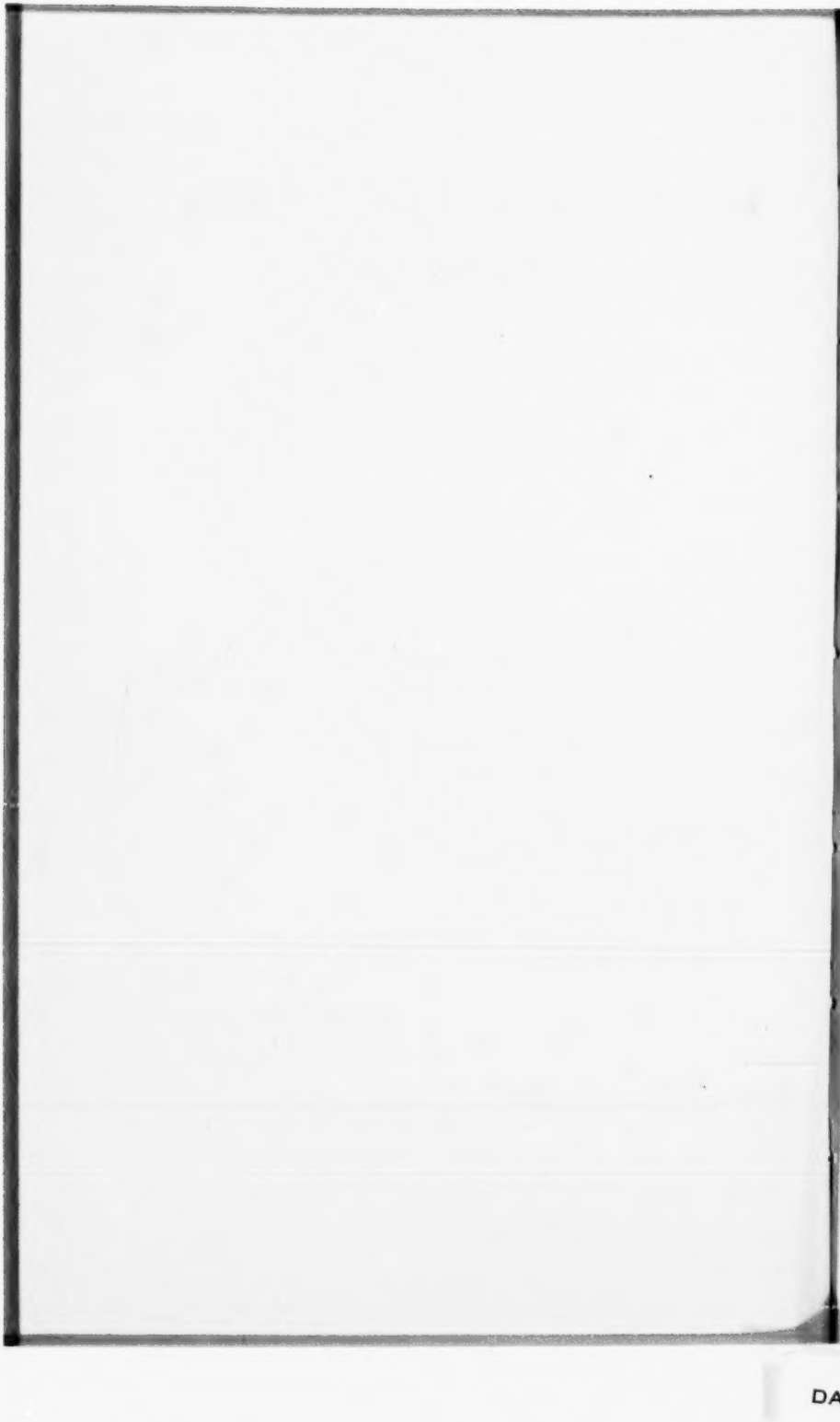
There was evidence that the defendant, accompanied by a man named Minkoff, purchased a certain filter press from an equipment company in New York in the name of a fictitious company and that a filter press of that type was found at the still when it was raided. Minkoff, himself, purchased, not in the defendant's company, five-gallon cans and caps which were found at the still's site. This links Minkoff with the conspiracy. No one of these facts by itself would justify a conviction. But all of them taken together are too strong to be dismissed as mere coincidences. We think the jury could properly have found the defendant guilty under the very careful charge of the trial judge. The evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt. Holland v. United States, 348 U.S. 121 (1954), rehearing denied, 348 U.S. 932 (1955).

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit.



In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 825

PERRY J. FISHMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80-82)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1957 (R. 83), and a petition for rehearing was denied on February 11, 1957 (R. 85-88). The petition for a writ of certiorari was filed on March 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] References designated "R." refer to the petitioner's appendix.

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STATUTE:

18 U.S.C. 371	2

QUESTION PRESENTED

Whether circumstantial evidence as to petitioner's participation in a conspiracy to violate federal liquor laws was sufficient to warrant his conviction.

STATUTE INVOLVED

18 U.S.C. 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

STATEMENT

Petitioner and others were convicted by a jury in the United States District Court for the District of New Jersey of conspiracy to distill liquor in violation of the United States liquor laws (R. 1). Petitioner was sentenced to imprisonment for two years and six months (R. 2). On appeal, his conviction was unanimously affirmed (R. 2, 83).

Pertinent evidence adduced at the trial may be summarized as follows:

Government agents, after obtaining knowledge of an illegal still on property known as Indian Hill Farms, proceeded there on the evening of July 30, 1953, to execute a search warrant (R. 3-5, 7-8). The agents observed the still in operation in a farm house, and arrested one defendant (R. 9-11). About two hours later (R. 4, 11), petitioner was driven by another person in an automobile into a lane near the

dwelling house on the farm. An agent identified himself and placed petitioner under arrest (R. 12). At the time of the raid the agents found at the still a large press used to filter mash, a number of 5-gallon cans and caps, an oil burner, and large quantities of sugar (R. 9, 11).

On June 5, 1953, prior to the raid, petitioner and defendant Minkoff (deceased at time of trial) had gone to a New York equipment company to purchase a filter press in the name of a fictitious company. Minkoff paid $700 cash for the filter press (R. 15-17, 20, 21, 67). The seller testified that a photograph of the filter press at the still (Gov. Ex. 6) was "similar to the one [he had] sold" (R. 22, 23). In June and July 1953, Minkoff (not in petitioner's presence) made numerous large scale purchases for cash of 5-gallon cans and caps similar to those found at the site of the still (R. 47, 50-55, 11).

Also prior to the raid, on June 24, 1953, petitioner had purchased, under a fictitious name, at Trenton, New Jersey, a 17-gallon per hour industrial "Nairoil Burner" for $277.44 cash (R. 27-29, 44-45). The seller identified petitioner, and stated that he put the oil burner in petitioner's car at the time of delivery (R. 29, 30). Petitioner made later trips to procure accessories for the oil burner (R. 30-31). When asked whether the photograph of the oil burner discovered at the still (Gov. Ex. 5) was that of the burner he had sold, the seller replied, "It would seem so, * * * it is a large oil burner" (R. 31-32).

ARGUMENT

The sole question presented is the sufficiency of the evidence to support petitioner's conviction of conspiracy to violate the liquor laws. The general inferences deducible from the totality of the evidence summarized in the Statement were sufficient to establish petitioner's participation in the conspiracy. Cf. *Tenore* v. *United States,* 207 F. 2d 565 (C.A. 1); *Butler* v. *United States,* 197 F. 2d 561, 563 (C.A. 10).

The substance of petitioner's argument is that the Court of Appeals should have reversed his conviction since it could have found—as it did in *United States* v. *Gerke,* 125 F. 2d 243 (C.A. 3), certiorari denied, 316 U.S. 667 and *Girgenti* v. *United States,* 81 F. 2d 741 (C.A. 3) [see Pet. 8, 9]—that the evidence against him was equally susceptible to a finding of innocence, as it was of guilt. This is not the proper test to be employed in determining the sufficiency of circumstantial evidence to establish a conspiracy. Here the jury *could* have found beyond a reasonable doubt—under instructions the validity of which petitioner does not challenge—that the circumstantial evidence excluded every reasonable hypothesis but that of guilt. The case was therefore properly submitted to the jury and its decision became final. *Schino* v. *United States,* 209 F. 2d 67, 72 (C.A. 9), certiorari denied, 347 U.S. 937; *Curley* v. *United States,* 160 F. 2d 229, 232-233 (C.A. D.C.), certiorari denied, 331 U.S. 837; *Stoppelli* v. *United States,* 183 F. 2d 391, 393 (C.A. 9), certiorari denied, 340 U.S. 864. Moreover, the function of this Court is not to weigh the evidence, but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *United States* v. *Socony-Vac-*

uum Oil Co., 310 U.S. 150, 254; *Abrams* v. *United States,* 250 U.S. 616, 619; *Glasser* v. *United States,* 315 U.S. 60, 80.

In *Holland* v. *United States,* 348 U.S. 121, 139-140, this Court held that refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt, was not error where the jury was properly instructed on the standards for reasonable doubt. This holding is entirely consistent with the proposition for which the court below cites it, *viz.,* "The evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt" (R. 81-82).

United States v. *Falcone,* 311 U.S. 205, upon which petitioner relies, is distinguishable from the instant case. In *Falcone,* this Court held that a mere supplier of materials to an illicit distiller is not guilty of conspiracy, even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. Here there is no evidence that petitioner engaged in any retail or wholesale trade as a supplier of materials, and no evidence that either petitioner or Minkoff resold the oil burner and filter press to anyone. Rather the jury could draw the reasonable inferences that these items of equipment were used directly by petitioner and the other conspirators in carrying out the purposes of the conspiracy, and that petitioner had knowledge of the conspiracy.

CONCLUSION

The case was decided in accordance with established legal principles, and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1957.

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